SEBRENA STECKTY

Gmail by Google

Sabrina Steketee <sabrina@gopantherz.com>

re HB 339 / EXHIBIT #8 DATE 2-13-15 HB HB 339

HB 339 AG and SC opinions

Sabrina Steketee <sabrina@gopantherz.com> Thu, Feb 12, 2015 at 9:22 PM
To: "jessmann@mt.gov" <jessmann@mt.gov>, Bob Vogel <bvogel@mtsba.org>

Hi, Representative Essman.

Attached for your review are:

(1) **State ex. Re. Wilson v. Willis (1913) 47 M 548,, 133 P 962.**

"No case. . .nor any analysis. . . suggests that the phrase "a majority of the members" could mean more than a majority of those constituting the actual membership of the body at the time, . . "

(2) **Attorney General Opinion from Vol. 42, Op. 51, 1988**

"The term "constituent membership" is not defined but presumably refers to a group of individuals possessing statutory authority to make decisions on behalf of the involved agency by majority action." (Specifically includes school boards as an example.)

(3) **Montana Attorney General Opinion Vol. 47, No. 20, 1998**

"In reckoning a quorum in the absence of a controlling statutory provision, the general rule is that the total number of all duly elected and qualified members of the council is taken as the basis."

(4) **Missoula City Attorney Opinion 2007-017**

"A quorum is a majority of the currently qualified members of the body who are eligible to vote to make the group or body's actions valid."

(5) **West Virginia Ethics Commission Open Meetings Advisory Opinion No. 2007-11**

"A quorum for constituent membership is that number of a majority of its members in office at a given time."

MTSBA has provided these opinions today (I had them before) but I will copy Bob Vogel on this as we discussed today.

I include the West Virginia opinion to show that the position is also held elsewhere in our country that the number required for quorum is based on the count of those currently in office rather than the number that could be in office if all seats were filled. There are several more opinions like this around the country.

I hope this makes clear that we are not trying to change anything. We are just trying to catch up the language in statute regarding school board quorum with the case law to eliminate the confusion that could lead to legal conflict.

Thank you for your time today, I appreciate it a great deal.

Sabrina

Sabrina Sanddal Steketee
2014-15 Chair, Jefferson High School Board of Trustees
2014-15 Immediate Past President, Montana School Boards Association
Boulder, MT
Cell: 406-431-1285

PLEASE NOTE: Any communication from me, unless expressly stated otherwise, is a communication made only on my own behalf, and expressly NOT on behalf of any organization with which I am associated.

---

5 attachments

Missoula City Attorney Opinion 2007-017 email outline.pdf
178K

42 AG OP 51 Open Meetings highlighted.pdf
233K

Montana Attorney General Opinion Vol. 47, No. 20, 1998 highlighted.pdf
71K

State v Willis highlighted.pdf
42K

West Virginia Ethics Commission Open Meeting Advisory Opinion No. 2007-11.pdf
141K

47 Mont. 548
Supreme Court of Montana.

STATE EX REL. WILSON
v.
WILLIS, CITY CLERK, ET AL.

June 20, 1913.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Mandamus by the State of Montana, on the relation of John D. Wilson, against W. A. Willis, as city clerk of Butte, and the City of Butte. Peremptory writ awarded, and defendants appeal. Affirmed.

West Headnotes (3)

[1] **Mandamus** ⇐ Elections and Proceedings Relating Thereto

Under Rev.Codes, § 3248, requiring an alderman to subscribe to an oath in writing, and section 3253 requiring a city clerk to file all city records and to record the proceedings of the council, held that, as to the vote of a member of the council electing him and as to his own oath of office, the member might by mandamus compel the city clerk to file the vote and record the oath.

2 Cases that cite this headnote

[2] **Municipal Corporations** ⇐ Determination of Qualifications of Members

The only office a certificate of election as alderman performs is to officially inform the council, but where they have elected a member by their own official action the issuance of a certificate to such member is not necessary to entitle him to vote at the election of another member.

Cases that cite this headnote

[3] **Municipal Corporations** ⇐ Term of Office, Vacancies, and Holding Over

Rev.Codes, § 3226, providing that "a majority vote of the members" of a city council might fill a vacancy, *held* to apply to the filling of a vacancy by the city council instead of section 3263 making "a majority of the whole number of the members elected" requisite to an election, so that, where the members of board had been reduced from 16 to 15 eight votes were a majority sufficient to elect.

10 Cases that cite this headnote

Attorneys and Law Firms

***963** Alex Mackel, W. F. Davis, N. A. Rotering, and John A. Smith, all of Butte, for appellants.

L. O. Evans, of Butte, W. B. Rodgers, of Anaconda, and John E. Corette, of Butte, for respondent.

Opinion

SANNER, J.

The city of Butte is composed of eight wards and its full complement of aldermen is 16. On April 16, 1913, John C. Smith, one of the aldermen for the third ward, resigned, and on April 23d a meeting of the city council was held for the purpose of filling the vacancy thus created. At this meeting one W. E. Rowan received the votes of eight aldermen and one James Walsh received the votes of six, whereupon the mayor declared that no election had resulted for the reason that the votes of nine aldermen were necessary. On May 1st Rowan tendered his oath of office to the city clerk for filing and demanded of the city clerk that he file said oath and issue a certificate of election, but the city clerk refused to do either, and thereupon Rowan instituted proceedings in mandate, which culminated on May 7th in the issuance by the district court of Silver Bow county of a peremptory writ requiring the city clerk to file the oath and issue the certificate, and Rowen received his certificate on that day.

In the meantime, and on April 30th, John Hawke, an alderman of the fourth ward, died, and on May 5th a regular meeting of the city council was held at which all the living aldermen of the city (including said Rowan) were present, together with the mayor. The matter of filling the vacancy caused by the death of Alderman Hawke was taken up, and the respondent Wilson and one John C. Driscoll were nominated, and it is alleged in the petition that Wilson received the votes of eight aldermen (including Rowan), and Driscoll received the votes of seven, whereupon the mayor, refusing to recognize the right of Rowan to vote, announced a tie vote of seven to seven and cast his own vote for Driscoll. It is further alleged in the petition that at the time of said election, and before the vote was recorded, said Rowan demanded that his vote be recorded for Wilson, but this the city clerk refused to do. On May 14th Wilson tendered his oath of office to the city clerk for filing and demanded that the city clerk file the same and issue a certificate of election, which the city clerk refused to do. On May 15th Wilson commenced this proceeding to compel the city clerk by judicial mandate to record Rowan's vote for Wilson in the minutes of May 5, 1913, to file the oath of office of Wilson as an alderman of the fourth ward and to issue to Wilson a certificate of election. An alternative writ was issued, and, after a motion to quash had been filed by the city clerk and denied by the court, answer was made and a reply filed. Upon the issues thus framed the cause was heard, and upon the testimony taken the only issues of fact, viz., whether Rowan had voted for Wilson at the meeting of May 5th and whether he had demanded that his vote be so recorded, were found for the relator Wilson. Judgment resulted awarding a peremptory ***964** writ commanding the clerk to record Rowan's vote for plaintiff and to file Wilson's oath of office. This appeal is from that judgment.

1. There is nothing before us upon which the correctness of the finding that Rowan voted for Wilson and demanded that his vote be so recorded can be assailed.

[1] [2] The question then is whether he was a member of the council at the time. The appellant contends in the negative, asserting that under section 3263, Revised Codes, the votes of nine members were necessary to elect Rowan, which confessedly he did not have. Section 3263 forms part of a chapter of the political Code especially devoted to the legislative powers of cities. It was brought forward from the Political Code of 1895, where it appeared as section 4803, and its language is as follows: "The ayes and noes must be called and recorded on the final passage of any ordinance, by-law, or resolution, or making any contract, and the voting on the election or appointment of any officer must be viva voce, and a majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded." If the selection, by the council, of an alderman to fill a vacancy existing in its membership is within the purview of this section, then there cannot be the slightest doubt that the contention of appellant must be upheld, for nothing can be clearer than that the phrase "a majority of the whole number of the members elected" means a majority of the entire number necessary to constitute the full membership of the council, and this, in the case of Butte, would be nine. Wood v. Gordon, 58 W. Va. 321, 52 S. E. 261; Pollasky v. Schmid, 128 Mich. 699, 87 N. W. 1030, 55 L. R. A. 614, 92 Am. St. Rep. 560; Pimental v. San Francisco, 21 Cal. 351.

But there are excellent reasons for the belief that section 3263 is not the provision to be applied to the case of an election by the council to fill vacancies in its own body caused by resignation or death. In article 2, c. 3, tit. 3, pt. 4, of the Political Code, which is devoted to the general subject of municipal officers and elections, we find section 3236: "When any vacancy occurs in any elective office, the council, by a majority vote of the members, may fill the same for the unexpired term, and until the

qualification of the successor. A vacancy in the office of alderman must be filled from the ward in which the vacancy exists, but if the council shall fail to fill such vacancy before the time for the next election the qualified electors of such city or ward may nominate and elect a successor to such office. The council, upon written charges, to be entered upon their journal, after notice to the party and after trial by the council, by vote of two-thirds of all the members elect, may remove any officer." This section was enacted in 1903 and, being the later legislative utterance upon the subject, must control if any substantial conflict exists between its provisions and those of section 3263. It is to be observed that by section 3236 "a majority vote of the members" is required to fill a vacancy, whereas the "vote of two-thirds of all the members elect" is required to remove from office. Both of these phrases are designed as bases upon which to determine the sufficiency of the vote, and it must be presumed that in the enactment of this statute the Legislature had in mind a distinction as real as the language, under settled construction, expresses. No case called to our attention or revealed by our own researches, nor any analysis of the language independent of authority, suggests that the phrase "a majority of the members" could mean more than a majority of those constituting the actual membership of the body at the time, so that, if the full membership is 16 but at a given time has been in fact reduced by the resignation of one, there are but 15 members. State v. Orr, 61 Ohio St. 384, 56 N. E. 14; People ex rel. Funk v. Wright, 30 Colo. 439, 71 Pac. 365; Board of Commissioners v. Wachovia L. & T. Co., 143 N. C. 110, 55 S. E. 442. Hence, as long as there is a quorum present, a majority of 15, or 8, will elect to fill a vacancy. Nalle v. City of Austin, 41 Tex. Civ. App. 423, 93 S. W. 141; People ex rel. Funk v. Wright, supra. We are not called upon to determine whether a majority of a bare quorum will suffice, as suggested by the respondent, nor what might be the situation if 10 of the aldermen were killed at one time, as suggested by the appellant; happily neither situation is presented, and we confine ourselves to a determination of the case as made by the record.

2. It is next contended that, even if Rowan was in fact elected as alderman prior to the meeting of May 5th, still no certificate of election had been issued to him, no recognition had been accorded him by the mayor, and no final decision had been rendered as to his status by the court in which the matter was pending, and therefore he was not entitled to vote. The only office a certificate of election could have performed was to officially inform the council of the election of Mr. Rowan; but they required no such information. Having elected Mr. Rowan by their own official action, they had official cognizance of it and the certificate was not necessary. Neither did the right of Rowan to participate in the meeting of May 5th depend upon recognition by the mayor or the decision of the district court. It depended upon whether he had been in fact chosen by the council and whether he had taken and subscribed the constitutional oath; both conditions having been met, there was no legal obstacle to the exercise by him, on May 5th, of all rights and privileges of the office. Since Rowan was properly present and participating ***965** in the meeting of May 5th, and since he then voted and demanded that his vote be recorded for the respondent Wilson, it follows that Wilson had 8 votes. By the death of Hawke, the actual membership of the council at the time was 15, and 8 was sufficient. Wilson was therefore duly elected alderman and is entitled to be seated as such.

[3] 3. Then, if this is so, appellant argues that a reversal of the case should follow because no right of Wilson's was invaded by the omissions complained of, and because the statute does not require the clerk to file the oath. We do not appreciate the argument. Doubtless the present form of action was employed primarily to ascertain whether Wilson had been elected; but, having been elected, he was required not merely to take, but to subscribe, the constitutional oath (Rev. Codes, § 3248). This means that the oath must be in writing, and it cannot be supposed that, having subscribed the written oath, the officer should then throw it away or carry it about upon his person. Clearly the oath, when taken and subscribed, was intended to become a record of the city. Again, the vote of Rowan for Wilson was part of the proceedings of the council at the meeting of May 5th and it constituted evidence of Wilson's right to the office, which, together with the vote of the other members, it was necessary should be recorded fully and accurately. By section 3253, Revised Codes, it is made the duty of the clerk to file and keep all records, books, and papers belonging to the city, and also to record the proceedings of the council. We see no reason why he should not be compelled by mandate to perform either duty when he has failed therein.

The judgment appealed from is affirmed.

Affirmed.

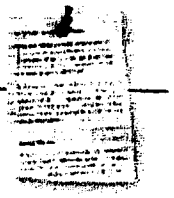
BRANTLY, C. J., and HOLLOWAY, J., concur.

Parallel Citations

133 P. 962

End of Document

Document



This document, ranked number *2* in the hitlist, was retrieved from the *ag* database.

Lake County
Dated Jan. 7, 1988

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42 OPINION NO. 51

FISH, WILDLIFE, AND PARKS, DEPARTMENT OF - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;
INDIANS - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;
OPEN MEETINGS - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;
STATE AGENCIES - Application of open meeting law to director of Department of Fish, Wildlife, and Parks;
ADMINISTRATIVE RULES OF MONTANA - Section 12.2.305;
MONTANA CODE ANNOTATED - Sections 2-3-101 to 2-3-114, 2-3-201 to 2-3-221, 2-3-202, 2-3-203, 2-15-112(1), 2-15-124(8), 2-15-3301, 18-11-103;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 170 (1978)

HELD: Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

7 January 1988

Larry J. Nistler

Lake County Attorney
Lake County Courthouse
Polson MT 59860

Dear Mr. Nistler:

You requested my opinion on the following question:

> Whether discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are subject to Montana's open meeting statutory provisions.

198

OPINIONS OF THE ATTORNEY GENERAL

I conclude that such discussions do not constitute a "meeting" under section 2-3-203, MCA, because the director of the Department, when acting alone on behalf of the Department, does not fall within the scope of the term "quorum of the constituent membership" used in that provision.

The facts giving rise to your question are undisputed. The director and tribal representatives have met regularly to discuss entering into a state-tribal cooperative agreement which would resolve potential conflicts over regulation of on-reservation hunting and fishing. Such a cooperative agreement is authorized by Title 18, chapter 11, MCA. Section 18-11-103, MCA, permits a public agency, such as the Department, to enter into an agreement with any one or more tribal governments "to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments entering into the contract is authorized by law to perform." As Department head, the director is generally empowered to act on the Department's behalf in securing such agreements. Secs. 2-15-112(1), 2-15-3301, MCA. When attending the discussions the director was at times accompanied by his attorney and a regional supervisor. However, their presence could have no legal effect on securing the state-tribal agreement, since the authority lies in the director alone. The question presented here is whether the negotiations between the director and tribal representatives are subject to Montana's open meeting law, secs. 2-3-201 to 221, MCA.

Montana's open meeting requirements are founded in the Constitution, article II, section 9:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits

of public disclosure.

This provision is implemented in part by the open meeting law. Section 2-3-203(1), MCA, states:

> All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

That section further provides that a public meeting may be closed if the discussion relates to a matter of individual privacy and the presiding officer determines that the demands of individual privacy exceed the merits of public disclosure. The meeting may also be closed to discuss litigation and collective bargaining strategy. Secs. 2-3-203(3), (4), MCA. But see 37 Op. Att'y Gen. No. 170 at 716 (1978). Because I conclude that no "meeting" has occurred here, there is no need to discuss whether the privacy or litigation exceptions apply to the discussions at issue.

The term "meeting" is defined in section 2-3-202, MCA:

> As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. [Emphasis added.]

Only such meetings are subject to the open meeting statutory requirements. Sec. 2-3-203(1), MCA. The term "constituent membership" is not defined but presumably refers to a group of individuals possessing statutory authority to make decisions on behalf of the involved public agency by majority action. Examples of constituent memberships include the various state government commissions or advisory councils and numerous local government entities such as county commissions and school boards. Conversely, the department head of a state agency, such as the director here, can hardly be viewed as the "constituent membership" of his agency when carrying out statutory responsibilities vested in him alone. At the outset, therefore, substantial textual difficulties accompany the contention that discussions between the director and tribal representatives fall within the scope of section 2-3-202, MCA. The inapplicability of the "meeting" definition to a department head acting alone is further

The only people possessing statutory authority at the time of a meeting are those duly elected or appointed and sworn in.

(my personal note - Sabrina)

highlighted by the quorum requirement in section 2-3-202, MCA, and the utilization of the words "deliberations" and "discussion" in sections 2-3-201 and 2-3-203, MCA.

"Quorum" is not specifically defined in the open meeting law. However, it is generally held that in the absence of a contrary statutory provision, a quorum consists of a majority of the entire body. Black's Law Dictionary 1421 (4th ed. 1968); Mad Butcher, Inc. v. Parker, 628 S.W.2d 582, 585 (Ark. Ct. App. 1982); Alonzo v.

Louisiana Dept. of Highways, 268 So. 2d 52, 54 (La. Ct. App. 1972). See sec. 2-15-124(8), MCA (defining a quorum for quasi-judicial boards as "a majority of the membership"). The term "quorum" is typically used in the context of a deliberative body consisting of members who act collectively. E.g., State v. Conrad, 197 Mont. 406, 643 P.2d 239, 241 (1982); Board of Trustees v. Board of County Commissioners, 186 Mont. 148, 606 P.2d 1068, 1071, 1073 (1980); Alonzo v. Louisiana Dept. of Highways, 268 So. 2d at 54. See 74 C.J.S. 171 (1951) ("The idea of a `quorum' is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action. Thus the word `quorum' implies a meeting, and the action must be group action, not merely the action of a particular number of members as individuals") (citations omitted). Use of "deliberations" and "discussions" in the context of open meeting laws connotes collective discussion and collective acquisition of information among the "constituent membership" of the agency. See Grein v. Board of Education, 343 N.W.2d 718, 722 (Neb. 1984); Stockton Newspapers v. Members of the Redevelopment Agency, 214 Cal. Rptr. 561, 564 (Cal. Ct. App. 1985); Accardi v. Mayor and Council of Cite of North Wildwood, 368 A.2d 416, 421 (N.J. 1976); cf. People ex rel. Hopf v. Barger, 332 N.E.2d 649, 658-59 (Ill. 1975). Indeed, to hold that an agency director alone is a "quorum of the constituent membership" of such agency effectively means that he would be deemed meeting with himself--a conclusion directly at odds with common sense. See MacLachlan v. McNary, 684 S.W.2d 534, 537 (Mo. Ct. App. 1984) (a single-member body cannot have public meetings).

It is thus evident that the discussions between the director and tribal representatives or other members of the public do not fall within the scope of section 2-3-202, MCA. The inapplicability of the open meeting statutory provisions, however, does not mean an agency decision to enter into a state-tribal cooperative agreement is immune from public scrutiny prior to the agreement being consummated. The Department has

developed procedures pursuant to section 2-3-103(1), MCA, to "assure adequate notice and [to] assist public participation before a final agency action is taken that is of significant interest to the public." See sec. 12.2.305, ARM. While the issue of whether a cooperative agreement arising from the current negotiations is of "significant interest to the public" is not before me, the notice requirement must be liberally construed to achieve the salutary purpose of the public participation provisions in sections 2-3-101

to 114, MCA. Compliance with these provisions will permit full public involvement in governmental decisionmaking.

THEREFORE, IT IS MY OPINION:

> Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

Very truly yours,

MIKE GREELY
Attorney General

47 Op. Att'y Gen. No. 20

CITIES AND TOWNS - Quorum requirements for town council meeting; MUNICIPAL GOVERNMENT - Authority of town council to adopt quorum provisions by ordinance; MONTANA CODE ANNOTATED - Sections 7-3-203, -4221(1)(b), 7-5-4101, -4102, -4121; OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 84 (1986).

HELD:

1. In a commission-executive form of local government, the presence of the president of the town council, serving as acting mayor in the absence of the mayor, and two of the remaining three members of the council is sufficient to constitute a quorum for the transaction of business.

2. A town with a weak-mayor form of municipal government does not have authority to adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b).

Mr. Eric Rasmusson Boulder Town Attorney P.O. Box 587
Boulder, MT 59632

Dear Mr. Rasmusson:

You have requested my opinion on several questions concerning the number of town council members necessary to constitute a quorum. I have restated the questions as follows:

1. Where the mayor is absent from a town council meeting in the Town of Boulder and the president of the council serves as acting mayor, is the acting mayor considered a member of the council for purposes of determining whether sufficient members are present to constitute a quorum?

2. May the Town of Boulder adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3- 4221(1)(b)?

Your letter of inquiry states the following facts which I assume to be true for purposes of this opinion. The Town of Boulder operates under a weak-mayor (or "commission-executive") form of government with a four-person town council. See Mont. Code Ann. tit. 7, ch. 3, pt. 2. One of the councilpersons serves as president of the town council. On June 1, 1997, the office of mayor became vacant as a result of the mayor's resignation, and the president of the town council became "acting mayor" pursuant to a town ordinance which provides that in the absence of the mayor the president of the council "shall exercise all the powers and discharge all duties" of the mayor and shall be styled the "acting mayor" while performing the duties of the mayor.

At the meeting on June 23, prior to the appointment of a successor to the mayor, the president of the council and two other council members were present. The fourth councilperson was absent from the meeting. The president of the council served as acting mayor during the meeting. Following the meeting a question arose as to

whether the decisions made at the meeting were valid in view of the quorum requirements of state law and the provisions of Boulder's ordinances.

Montana Code Annotated § 7-5-4121(1) provides that "[a] majority of the members of the council constitute a quorum for the transaction of business, but a less number may meet and adjourn to any time stated and may compel the attendance of absent members, under such rules and penalties as the council may prescribe." In your letter of inquiry you observe parenthetically that Mont. Code Ann. § 7-3- 4221(1)(b) sets forth a different method for determining a quorum for a council meeting; however, you correctly conclude that this statute applies only to cities that have reorganized as a municipal-commission

government under the provisions of Mont. Code Ann. title 7, chapter 3, part 42, and therefore does not apply to a weak-mayor municipal government such as Boulder's.

A majority of a four-person council would be three members, so the attendance of three members at a meeting of the Boulder Town Council would ordinarily be sufficient to constitute a quorum for the transaction of business. However, when one of the council members is serving as acting mayor, the question then arises as to the status of that council member for purposes of determining whether a quorum is present. Your letter notes that the acting mayor, who is required by ordinance to exercise the powers and discharge the duties of the mayor at a town council meeting, performs an executive function quite different from the legislative function of a council member. Although the mayor is the presiding officer of the council, the mayor is not expressly made a member of the council and does not vote on any question except to break a tie vote; in addition, the mayor has authority to veto the council's resolutions and ordinances, and otherwise performs executive duties apart from the council. See Mont. Code Ann. §§ 7-3-203, 7-5-4102. It would appear that one person could not serve both as mayor and as council member simultaneously at a town council meeting without raising concerns about the proper separation of municipal powers, and it may be argued that a council member who becomes acting mayor loses, at least temporarily, his or her status as a member of the council.

Your letter also acknowledges the opposing view that a member of the town council who serves as acting mayor in the absence of the mayor remains a councilperson and should not be divested of the position to which he or she was elected, even temporarily, simply by discharging the mayor's duties. Divesting the acting mayor of his or her status as a councilperson would arguably create a temporary vacancy in the council and might serve to deprive the electors of their legislative voice in council matters.

Montana's statutory law does not provide an answer to your inquiry, and there are no reported decisions of the Montana Supreme Court which address or shed light on the matter. I am therefore guided by the common-law principles concerning the method of determining or reckoning a quorum. See 62 C.J.S. Municipal Corporations § 399 (1949); 56 Am. Jur. 2d Municipal Corporations §§ 163, 176 (1971). The common-law principles derived from these secondary legal sources are summarized below and provide a basis for resolving the inquiry.

and next p3

At common law and under state statutes such as Montana's, a majority of the duly elected members of a municipal council constitute a quorum, although more than a majority may be required to be present in order for the council to take particular actions. See, e.g., Mont. Code Ann. § 7-5-4121(2). In reckoning a quorum in the absence of a controlling statutory provision, the general rule is that the total number of all of the duly elected and qualified members of the council is taken as the basis. While the mayor or chief executive may be included in the count under some statutes (see Mont. Code Ann. § 7-3-4221), the mayor is not made a member of the council and is not included in the number on which the quorum is reckoned under other statutes such as Mont. Code Ann. § 7-5-4121, which applies to the Town of Boulder. However, even though the mayor is not counted in the determination of a quorum under such a statute, a member of the council who acts as mayor or presiding officer pro tempore in the absence of the mayor is counted in determining whether or not a quorum is present. Shugars v. Hamilton, 92 S.W. 564 (Ky. 1906).

The Shugars case also illustrates the common-law principle that a member of a municipal council who serves as mayor pro tempore retains the right to vote as a member of the council. Thus the president of the council, when serving as acting mayor in the absence of the mayor, may vote on a measure with the other members of the council and then, as acting mayor, cast the deciding vote in case of a tie. Id., 92 S.W. at 565.

It is therefore my opinion that the presence of the president of the council, serving as acting mayor, and two other members of the council was sufficient to constitute a quorum at the meeting of the Boulder Town Council on June 23, 1997.

You have also asked whether the Town of Boulder may adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b), which states that in cities having a mayor and four councilmen, the mayor and two councilmen or three councilmen shall constitute a quorum for a council meeting. I assume for purposes of this question that the Town of Boulder is governed by a municipal government with general

government powers. As discussed above, this statute applies to cities that have abandoned their organizations and have reorganized under the municipal-commission form of government, in which the mayor has an equal vote with the councilmen on all questions coming before the council and thus exercises legislative as well as executive functions in the city government. The statute would not ordinarily apply to the Town of Boulder, which has a commission-executive form of government.

A town council such as Boulder's has the power to enact ordinances not repugnant to the statutory provisions set forth in title 7, chapter 5, part 41. Mont. Code Ann. § 7-5-4101. The quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b) would conflict with Mont. Code Ann. § 7-5-4121, which states that a majority of the members of the town council constitute a quorum and does not include the mayor as a member of the council for the determination of a quorum. An ordinance adopting a lesser quorum requirement would be repugnant to Mont. Code Ann. § 7-5-4121 and would not come within the ordinance authority of the town council. Generally, a municipal ordinance must be in harmony with the laws of the state; whenever an ordinance comes into conflict with a statute, the ordinance must give way. 41 Op. Att'y Gen.

No. 84 (1986); City of Billings v. Weatherwax, 193 Mont. 163, 630 P.2d 1216 (1981); State ex rel. Libby v. Haswell, 147 Mont. 492, 414 P.2d 652 (1966).

THEREFORE, IT IS MY OPINION:

1. In a commission-executive form of local government, the presence of the president of the town council, serving as acting mayor in the absence of the mayor, and two of the remaining three members of the council is sufficient to constitute a quorum for the transaction of business.

2. A town with a weak-mayor form of municipal government does not have authority to adopt by ordinance the quorum provisions of Mont. Code Ann. § 7-3-4221(1)(b).

Sincerely,

JOSEPH P. MAZUREK Attorney General

jpm/jp/dm

Gmail by Google

Sabrina Steketee <sabrina@gopantherz.com>

FW: Question on legal opinion 2007-017

Jim Nugent <JNugent@ci.missoula.mt.us> Thu, May 31, 2012 at 9:09 AM
To: "sabrina@gopantherz.com" <sabrina@gopantherz.com>
Cc: Kelleen Roseboom <KRoseboom@ci.missoula.mt.us>, Keithi Worthington <kworthington@ci.missoula.mt.us>

SABRINA:

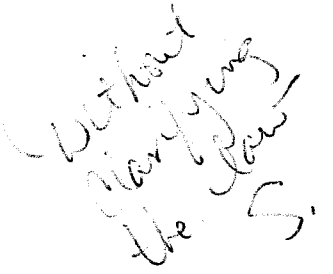
Pursuant to Montana municipal government law subsection 7-5-4121(1) MCA provides that "A majority of the members of the council constitute a quorum for the transaction of business". I believe that this means a majority of the actual existing members of the body that exist at the time of the meeting where business is being transacted taking into account that any vacancy would mean that there is no actual member serving in the vacant position at that specific moment. I also believe that similar legal logic should equally apply to school board meetings as well.

Arguably a quorum would be a quorum of the actual membership of the board that exists at the time the meeting is occurring. There is an old Montana Supreme Court case pertaining to the statutory requirement to fill municipal government city/town council vacancies by a majority vote of the city/town council that indicates that when there is a vacancy a majority of the membership is a majority of the total number of the actual members currently serving on the city/town council at the time of the vote to fill the vacancy. A logical legal extension of this legal logic is that a quorum is a majority of the existing actual membership at the time the board meeting is being held. See State ex. Re. Wilson v. Willis (1913) 47 M 548,, 133 P 962.

Therefore, while two vacancies exist on the seven (7) member school board, a quorum of the actual members of the school board would be three (3) of the five(5) actual currently serving school board members at the time of the school board meeting. While this is a common sense legal interpretation, there is no way to legally guarantee to you that this would be the outcome if there was litigation; so it would be prudent to strive for a quorum of four (4); so there are no legal doubts..

JIM NUGENT

From: Kelleen Roseboom
Sent: Thursday, May 31, 2012 6:31 AM
To: Jim Nugent; Keithi Worthington
Subject: Fw: Question on legal opinion 2007-017



Connected by DROID on Verizon Wireless

—Original message—

From: Sabrina Steketee <sabrina@gopantherz.com>
To: Kelleen Roseboom <KRoseboom@ci.missoula.mt.us>
Sent: Thu, May 31, 2012 12:29:44 GMT+00:00
Subject: Question on legal opinion 2007-017

Hi, Mr. Nugent.

I am the chair of the Jefferson High School Board of Trustees in Boulder, Montana. We currently have only five of seven trustees seated – no one ran for the two vacant seats in the recent election and we are in the process of filling those seats. In the meantime, we are trying to determine if a quorum of our board required to conduct business remains at four because we are supposed to be a seven member board and four is a majority of seven, or if the quorum requirement currently would be three because we only have five seated trustees currently and three is a majority of five.

We have received conflicting advice in this regard and today while trying to research the issue I came across your opinion 2007-017. Your conclusion 1. in this opinion states "Generally a quorum is a majority of the currently qualified members of the body."

Was the "currently qualified members" based on any particular statutory or case law reference that you could point me to?

Thank you for your time and assistance!

Sabrina Steketee, Chair

Jefferson High School Board of Trustees

Boulder, MT

OPEN MEETINGS ADVISORY OPINION NO. 2007-11

Issued On November 1, 2007 By The

WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners (Board) asks if vacant positions must be counted in determining a quorum.

FACTS RELIED UPON BY THE COMMITTEE

Effective July 1, 2007, the statute establishing the Board was amended to expand the Board's membership from 9 to 11 members. One of the additional members of the Board is required to be a licensed nuclear medicine technologist while the other added position calls for appointment of a licensed magnetic resonance imaging technologist. In addition, one Board Member has resigned.

To date, no members have been appointed to fill these vacancies. If these three vacancies are counted in determining a quorum, the Board would need to have 6 of the 8 currently serving members participate in a meeting to establish a quorum. If the vacant positions are not counted, only 5 participating members will be required to constitute a quorum.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2 provides the following definitions pertinent to this opinion:

> (4) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. . . .
>
> (7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

ADVISORY OPINION

The Open Meetings Act defines a "quorum" as "a simple majority of the constituent membership of a governing body." The Act does not further define what is meant by "constituent membership" nor is this term defined elsewhere in the Code.

The Board has requested guidance from this Committee on whether newly-created positions which have not yet been filled, or positions which are vacant due to a member's resignation, must be counted in determining whether a majority of the Board's "constituent membership" are properly gathered to convene a proper meeting.

This Committee finds that a substantially similar question was addressed by our Supreme Court of Appeals in State ex rel. Hatfield v. Farrar, 89 W. Va. 232, 109 S.E. 240 (1921). In the syllabus of its decision, the Court held:

> Under a statutory provision saying in general terms a majority of the members of a public tribunal, composed of a prescribed number of officers,

and next PS

> shall be necessary to form a quorum, a majority of its members in office at a given time suffices, and, if there are vacancies, a majority of the whole number elected to membership is not required.

Based upon our Supreme Court's ruling in Farrar, the Attorney General has similarly concluded that where 2 members of a 7-member Town Council had been legally disqualified from holding office and their seats were legally vacant, a quorum should be based upon the participation of a majority of the 5 remaining members. 33 W. Va. Op. Att'y Gen. 87 (1929). This Committee finds these opinions to be dispositive of the Board's inquiry.

Accordingly, where one or more authorized positions on a governing body which are ordinarily occupied by a member who is authorized to vote are vacant, such vacant positions are not counted in determining the whole number from which a majority must be calculated to determine a quorum. A position may be vacant for a number of reasons including: (1) the death of a member; (2) the resignation of a member, properly communicated to the appropriate authority and accepted, if required by law; (3) the removal of a member from office through established legal procedures; and (4) no person has yet been duly appointed or elected to fill the position, or such person has not accepted the appointment by being duly sworn. Ex-officio members of a governing body are not ordinarily counted in determining the whole number from which a majority must be established to obtain a quorum.

In regard to this particular inquiry, the Board is not required to count the 2 newly-created positions that have yet to be filled by appointment, nor the position which is vacant as a result of the written resignation of a Board Member, in determining whether it has a quorum to hold a meeting and conduct official business. Board Members whose terms have expired but whose successors have not yet been appointed remain constituent members in accordance with W. Va. Code § 6-5-2, as do those Board Members who are serving unexpired terms. Therefore, the Board currently has 8 constituent members and 5 of those members may establish a quorum under the Act.

This advisory opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1, *et seq.*, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6-9A-11, a governing body or member thereof that acts in good faith reliance on this advisory opinion has an absolute defense to any civil suit or criminal prosecution for any action taken based upon this opinion, so long as the underlying facts and circumstances surrounding the action are the same or substantially the same as those being addressed in this opinion, unless and until it is amended or revoked.

James E. Shepherd II, Chairman